SUPREME COURT, U. S.

APR 10 197

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-873

JACK HALPERIN,

Petitioner

versus

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

Charles W. Tessmer
706 Main Street, Suite 400
Dallas, Texas 75202
ATTORNEY FOR PETITIONER

Ronald L. Goranson
706 Main Street, Suite 400
Dallas, Texas 75202
(Of Counsel)

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REPLY BRIEF

Pursuant to Rule 24(4), Supreme Court Rules, the Petitioner JACK HALPERIN submits this memorandum in reply to the Memorandum for the United States in Opposition.

The Government's first contention in opposition is that the witness who taped the telephone conversations with the petitioner was merely an interested citizen. Such a contention borders upon the frivolous. Since it is doubtful that Ms. Weatherford was expecting a telephone call from Frank Sinatra, what was the purpose of the government attaching a recording device to the telephone if not to entrap the petitioner? The Government's position is analogous to holding that the draft notices of prior years were merely invitations to participate

in Armed Forces' social functions rather than an order to report for induction. It is obvious that Ms. Weatherford knew that the Government wanted. Since the Government provided the means for recording the conversation, the fact that the witness had the discretion to conduct the recording as she saw fit does not make her actions independent of the Government's responsibility.

The Government also contends that since the petitioner was not encouraged or induced into making the incriminating statements, Massiah v. United States, 377 U.S. 201 does not apply. Massiah and its progeny speak not of "inducement" or "encouragement", but only of "elicitations", and Massiah should apply where the Government merely supplies the opportunity to deceptively elicit statements from an indicted defendant in the absence of counsel.

The Government further contends that Massiah should not apply because the remarks in the present case were not directly incriminatory but only were relevant in disclosing a consciousness of guilt. The Government's position here is somewhat paradoxical. Earlier in the Memorandum the Government contends that an "agreement" was reached between the witness and the petitioner that she would not testify and that threats were made to keep her quiet. Now they contend the evidence is harmless and indirect. Further, even if the recording could only be considered to disclose indirectly a consciousness of guilt, Massiah speaks of the use of "incriminating words" and does not require that all of the elements of a confession must be present. Also, the use of the evidence by the Government (see Pet. 7) indicates direct involvement.

Finally, the Government contends that the recording was admissible because the commission of an independent criminal offense should not be ignored. Besides not being a recognized exception to the rule of Massiah (see Pet. 6), the Government overlooks the fact that an independent criminal action could have been brought alleging obstruction of justice. See United States v. Osser, 483 F.2d 727 (3rd Cir. 1973) and Vinyard v. United States, 335 F.2d 176 (8th Cir. 1964). Compare United States v. Hoffa, 385 U.S. 293, 309-310 (1966).

For the argument and authorities expressed herein and in the original petition, petitioner submits that a writ of certiorari should issue.

Respectfully submitted,

Charles W. Tessmer
706 Main Street, Suite 400
Dallas, Texas 75202

COUNSEL FOR PETITIONER

Ronald L. Goranson
706 Main Street, Suite 400
Dallas, Texas 75202

(Of Counsel)

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Reply Brief were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C., 20530, on the same date as shown in the letter of transmittal accompanying this Brief.

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Charles W. Tessmer